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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 49

EDWARD MISHKIN,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above-entitled action on the ground that it does not present a substantial federal question.

Jurisdiction

The appellant seeks to invoke this Court's jurisdiction under 28 U. S. C. §1257 (2) by contending *inter alia* that Section 1141 of the New York Penal Law is unconstitutionally vague.

Statement

The petitioner was convicted on December 14, 1960, after a trial in the Court of Special Sessions of the City of New York, of fifty-four crimes of UNLAWFULLY POSSESSING OBSCENE BOOKS (Penal Law, §1141), forty-three crimes UNLAWFULLY PUBLISHING OBSCENE BOOKS (*ibid.*), and forty-three crimes of HIRING OTHERS TO PREPARE OBSCENE BOOKS (*ibid.*). He was sentenced to serve penitentiary terms aggregating three years, and, in addition, fines totalling $12,500 were imposed (363-5, 2152-7).*

The Appellate Division modified and affirmed the judgment of conviction on November 27, 1962, and the Court of Appeals affirmed the order of the Appellate Division on December 3, 1964.

The trial record clearly depicted the defendant not as a casual practitioner of the art of pornography in the manner of a street corner vendor but, rather portrayed him as a major entrepreneur of that industry. The record forcefully established that the defendant hired others to prepare obscene books, published obscene books with calculated anonymity—and possessed obscene books with intent to sell [Penal Law, §1141].

I Preparation of the Obscene Books

Three writers and two artists testified that they had been hired by the defendant to write and illustrate most of the books in evidence (Exhs. 1-3, 5, 21-30, 32-4, 43-4, 60, 69-72). Each of the authors was directed to deal with sex in

* References, unless otherwise indicated, are to the Trial record.

an unusual manner (Hackshaw 1227-35; Johnson 1297-8, 1301-2, 1307, 1337-8; Rosen 1187).

Leotha Hackshaw was told to produce a book "full of sex scenes and lesbian scenes * * * the sex had to be very strong, it had to be very rough, it had to be clearly spelled out * * * the sex scenes had to be unusual sex scenes between men and women * * * he wanted scenes in which women were making love with women * * * lesbian scenes * * * and men making love to men, and there were spankings and scenes-sex in an abnormal and irregular fashion" (1227-35). She was also given instruction to emphasize "beating and fetishism" (1242). In addition to lesbian themes, Kenneth Johnson was instructed to "deal graphically with the implementation of wheels on a female's body, of the darkening of flesh under flagellation" (1307, 1337-8).

Under the defendant's direction, the artists produced numerous illustrations for the various exhibits (Stanton 1433-45; Bilbrew 1588-1611).

The writers and artists dealt with Mishkin at his store —Publisher's Outlet—which is located on West 42nd Street in the Times Square area (Rosen 1189-91, 1193-5; Hackshaw 1236, 1238-9; Johnson 1280-1, 1298, 1304, 1311-2, 1317, 1322, 1330, 1342; Stanton 1434-65; Bilbrew 1593, 1598-9, 1601-10).

II Possession of the Obscene Books

As previously noted, the defendant was charged with possession of a variety of obscene books at two locations, the warehouse and Publisher's Outlet. The initial counts

(1-32) are predicated on the possession of books found at the warehouse. The subsequent possession counts (36-53, 56-61, 63) are based on the books located at Publisher's Outlet. The record is more easily comprehended if the facts and circumstances relating to each location are separately stated.

(A) As to the warehouse

Upon the completion of the printing and binding most of the obscene books were stored in a warehouse located at 37 West 20th Street (Levenberg 546, 555-6, 1031). At the defendant's request Levenberg rented part of a warehouse to store Mishkin's books (547-55). Pursuant to an agreement Mishkin gave him one hundred dollars which he turned over to the landlord monthly (555). Initially, Mishkin had an employee who cared for the stock at the warehouse, filled orders and delivered books to the stores (564-8). After Mishkin fired the employee, Levenberg took on those additional duties (564-8). When the police began to close in on the defendant's operation, Mishkin told Levenberg to get rid of everything at the present shop and to stay away from the warehouse because "it was hot" (561-2, 823-6). Because his name was on the lease for Room 908 of the warehouse, Levenberg disregarded Mishkin's directions, went to the warehouse and moved the books to the warehouse basement (562).

For several weeks prior to January 12, 1960, Police Inspector Plansker was in the vicinity of the warehouse (471-9). During that time, he observed Levenberg use a bunker room in the basement of the building (471-9). On January 12, 1960, Plansker executed a search warrant at the ware-

house (398-401). In the basement room, the police found thousands of books comprising thirty-two of the titles in evidence (411-2, 415-29).

(B) As to the publisher's outlet

Publisher's Outlet is a large retail book store located at 254 West 42nd Street (429-30, 432). The defendant referred to the Outlet as "his store" (Levenberg 535-6; Vaccarella 1679-84, 1704-32) and conducted most of his business dealings from there (Levenberg 535-6, 546, 566-8, 822-3, 1031; Hayman 1127, 1129-34; Stanton 1434-65; Johnson 1281, 1298, 1311, 1317, 1342; Bilbrew 1593, 1598-610; Rosen 1189-91, 1193-5; Liberman 1641-3; Vaccarella 1674-6, 1679-84, 1704-32; Dryer 1960-2). The financial records of the Outlet corporation show that the defendant was an employee of the corporation who received a salary of $175.00 per week although the president of the corporation received only $100.00 for the same period (Abrams 1931-56).

For several weeks in December of 1959, the police were observing the activities at Publisher's Outlet (Plansker 477). Five police officers went to the book shop on December 29, and arrested three individuals (Plansker 467-70). They also seized over two hundred obscene books bearing twenty-two different titles (Exhs. 43-67; 432-49).

III Printing of the Obscene Books

Two photo offset printers were employed by the defendant to print the obscene books. Norman Levenberg printed all but three of the obscene books (Exhs. 1-30, 34-72; 518-25) and Paul Hayman did the rest (Exhs. 31-3; 1118-31, 1137).

Levenberg outlined the printing procedure. Mishkin would telephone him when he had a printing job (534-5). Levenberg would go to Mishkin's store where the defendant would give him a manuscript or a previously printed book (535-7). If a manuscript were involved the printer also received a picture for the book jacket and would be told what price to place on the cover (540, 546-7). If the manuscript were thin, additional instructions were given for padding the book to make it look thicker (540-1). The printer was also told to fabricate the name and address of a publisher and place it on the printed books (542-3). Quantities of one to five thousand books, at prices from fifteen to forty cents, were ordered by the defendant (575-8).

Levenberg then photographed the copy, made up photo-offset printing plates and printed the contents of the books in sheet form—an intermediate step of typesetting was required when he worked directly from a manuscript (537-40, 758-9). After the press run had been completed, Levenberg would take the printed sheets to a binder who would fold the sheets into book form and bind them (539, 759).

When the printing was completed Levenberg would place the books in a warehouse except for fifty copy sets which would be taken to each of the defendant's stores, Publisher's Outlet and Midget Book Shop (546, 1031). Levenberg, who was always paid in cash by the defendant, received as much as a thousand dollars on occasion (564, 576-8).

The prosecution also called two binders and a typesetter who testified that they had done binding and typing

work for Levenberg on a number of the obscene books (Yeeto 1732-76; Shaller 1793-4, 1799-1817; DeNino (by stipulation) 1825-31).

The Exhibits

The books in evidence involve fifty different titles. The probative force of the exhibits is two-fold. An analysis of the apparent characteristics of the material is pertinent to a finding of *scienter*. The contents of the exhibits, of course, are the substance of the crime charged.

The covers

The jackets and backing of most of the exhibits have illustrations which relate to the subject matter of the book. The covers of about nineteen of the books display women being whipped, beaten, tortured or abused (Exhs. 3, 4, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 31, 51, 52, 53, 55, 56). Practically all the book jackets depict symbols associated with fetishism (Exhs. 7, 9, 24, 45, 53 do not). One jacket depicts a lesbian seduction scene (Exh. 71, Stud Broad). Numerous exhibits display partially clothed or nude women whose breasts and buttocks are greatly exaggerated (see e.g., 2, 5, 12, 13, 23, 25, 26, 29, 46, 49, 55, 69, 71, 72). In addition to the illustrations the book jackets also reflect the titles in large print. A few of the more colorful titles are: "Swish! Bottom!" (Exh. 29), "The Dance with the Dominant Whip" (Exh. 11), "Colt of the Spankers" (Exh. 12), "Bound in Leather" (Exh. 47), "Fearful Ordeal in Restraintland" (Exh. 18) and "Return Visit to Fetterland" (Exh. 17).

It is further observed that some of the books have been printed in foreign countries (Exhs. 11, 12) and are restricted to a limited group of subscribers (Exhs. 1, 3, 5, 6, 8, 13, 29, 57).

Such cover blurbs as—"For Sophisticated Collectors of the Unusual," and "a novel of bondage," "The Story of the Creation of a Lesbian" and "The Unusual Story of a Woman Flagellant" (Exhs. 8, 29, 57, 71)—are present.

A note on the prices of the exhibits is pertinent. Although all of the books are of the pocket-book variety most of the exhibits are marked to sell at exorbitant prices [see *e.g.*, "Confession" (Exh. 13, 127 pp. at $15.00); "Chances Go Round" (Exh. 1, 50 pp. at $10.00); "Female Sultan" (Exh. 3, 150 pp. at $10.00)]. Fifteen other books sell for either four or five dollars and all contain less than one hundred and sixty pages (Exhs. 2, 4, 25, 26, 27, 28, 29, 30, 57, 60, 69, 70, 71, 72, 73).

The contents

The contents of this material is not easily categorized. The dominant theme of the matter is obvious. Subordinant themes, however, run across classification lines and indicate that the subject has multiple sexual elements interwoven. These elements may be roughly denominated as dealing with sado-masochism, fetishism, homosexuality and miscellaneous other sexual aberrations.

A large group of the exhibits may be denominated bondage or sado-masochistic books [Exhs. 14, 15, 16, 17, 18, 19, 20, 21, 51, 52, 53, 55, 56, 61, 62, 63, 64, 68]. This group

of exhibits is predominantly devoted to depicting pictorially and verbally innumerable scenes in which individuals are being tortured in varied and fantastic ways. In these sado-masochistic scenes, the victims of the many and varied atrocities are usually referred to as being in bondage or slavery. The victims, moreover, although portrayed in agony, experience pleasure. Sexual fetishism is also prevalent here (spike type heels, leather boots, tight clothing, gloves, whips, ropes and belts).

The "spanking" exhibits involve mistreatment of the victims which is slightly less destructive (Exhs. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 43, 44, 45). However, these exhibits all deal in great detail with whippings, beatings and spankings. Some are illustrated with pictures of the various punishments and the devices utilized. Others are more concerned with the incidents of sexual seduction, transvestism and fetishism which are liberally interspersed throughout the sado-masochistic "chastisements."

The final group of exhibits present multiple and particularized incidents of sexual seduction (homosexual and heterosexual), sodomy, rape, and masturbation [Exhs. 2, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 60, 69, 70, 71, 72]. Exhibit 72 in this record is a book entitled, "Queen Bee" which was found to be obscene by the New York Court of Appeals in *People* v. *Finkelstein* [11 N. Y. 2d 300 (1962)]. The rest of the books may be best described as efforts to duplicate or surpass that book in lewdness. Indeed, eight of the other books in this category were written by the author of "Queen Bee" (Exhs. 2, 27, 28, 30, 60, 69, 70, 71).

Statute Involved

Section 1141 of the Penal Law, in pertinent part, reads as follows:

> "1. A person who * * * has in his possession with intent to sell, lend, distribute * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic * * * book * * * or prints, utters, publishes, or in any manner manufactures, or prepares any such book * * * or who,
>
> "2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,
>
> "Is guilty of a misdemeanor * * *."

No Substantial Federal Questions are Presented.

(1) Section 1141 of the Penal Law is Constitutional.

To invoke this Court's direct appellate jurisdiction, the appellant argues that the terms "obscene," "masochistic," and "sadistic" appearing in Section 1141 of the Penal Law are unconstitutionally vague (brief, pts. 1, 2, 5, 6).

However, it is absolutely clear that the term obscene is not vague [*Roth* v. *United States,* 357 U. S. 477 (1957); *People* v. *Finkelstein,* 9 N. Y. 2d 343 (1961)]. Indeed, in *Jacobellis* v. *Ohio* [84 S. Ct. 1676 (1964)] this Court recently reaffirmed the *Roth* definition of obscenity as constitutionally viable.

The contentions relating to the words "masochistic" and "sadistic," moreover, are clearly beside the point, for

the trial court found that the books violated the statute on the ground of obscenity alone (2166-76; 26 Misc. 2d 152). In this regard, it is quite clear, from their ordinary definition and their position in the statute, that the terms sadistic and masochistic merely describe sub-categories or specialized types of obscenity. Intermixed in the statute as they are with such other terms as lewd, lascivious, filthy, indecent and disgusting, these terms only itemize or detail the characteristics of obscenity. The trial court noted "That section uses descriptive adjectives quoted above in addition to the adjective obscene and it was held that all these adjectives are synonymous with obscene (*People* v. *Brooklyn News Co.*, 12 Misc. 2d 768, 771)."

Similarly, the dictionary definitions of the terms sadistic and masochistic reflect the sexually perverse elements this Court ascribed to obscenity in *Richmond County News* [9 N. Y. 2d 578 (1961)].

Indeed, the standard for obscenity in New York has been established by *People* v. *Richmond County News* [*supra*]. That case, which further restricts the definition of obscenity as propounded by the United States Supreme Court [see *Roth* v. *United States*, 354 U. S. 476 (1957)], held that obscenity under the New York statute applies solely to "hard-core pornography." Stating that the test of obscene material is the content "objectively appraised," the Court of Appeals promulgated the following guide lines for proper evaluation:

> "It (hard-core pornography) focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Law-

rence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'. (Murray, Literature and Censorship, 14 Books on Trial, 393, 394; see, also, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, [illegible]."

The Indiana University Institute for Sex Research in its book Sexual Behavior of the Human Female sheds some additional light on these aberrations:

"Some persons are aroused sexually when they think of situations that involve cruelty, whipping, flagellation, torture or other means deliberately adopted for the infliction of pain. More individuals are emotionally disturbed when they contemplate such sado-masochistic situations, and they may not recognize such a disturbance as sexual;" (at p. 676).

"That fewer of the females and more of the males had responded, appears again to have depended on the fact that reactions to sado-masochistic stories rely on fantasy" (at p. 677).

"Persons who respond only or primarily to objects which are remote from the sexual partner, or remote from the overt sexual activities with a partner are not rare in the population. This is particularly true of individuals who are erotically aroused by high heels, by boots, by corsets, by tight clothing, by long gloves, by whips or by other objects which suggest sado-masochistic relationships and which may have been associated with the individual's previous sexual activity."

In addition to the detailed and repulsive treatment of sado-masochism, fetishism, flagellation and bondage, the material is further infected with particularized incidents of both homosexual and heterosexual seduction. Rape, masturbation, and sodomy have not been overlooked. Even the must cursory review of the exhibits reveals that all the elements which characterize obscenity are over abundantly prevalent here. In short, the content of the material objectively appraised smacks of fantasy and unreality while focusing on what is sexually morbid and grossly perverse and thus unquestionably comes within the "hard-core" test of *Richmond County News,* and, therefore, within the *Roth* test.

Significantly, this Court in *Winters* v. *New York* [333 U. S. 507 (1948)] while declaring the predecessor of the present subdivision 2 of Section 1141 of the Penal Law unconstitutional because of vagueness, commented [333 U. S. 507, 520]:

> "To say that a state may not punish by such a vague statute [Penal Law, §1141, subd. 2] carries no implication that it may not punish circulation of objectionable matter, assuming that it is not protected by the provisions of the First Amendment, by the use of apt words to describe the prohibited publications. Section 1141, subsection 1 [involved in the present case] * * * is an example."

(2) *Scienter* was Clearly Established.

The appellant contends that there was no proof as to his knowledge of the character of the books (brief, pts. 3, 4). Such a claim, however, is completely absurd in view

of the overwhelming proof of *scienter* developed during the trial.

His instructions to the writers, to produce books "full of sex scenes and lesbian scenes * * * the sex had to be very strong, it had to be very rough, it had to be clearly spelled out * * * and there were spankings and sex scenes in an abnormal and irregular fashion" (1227-35), clearly demonstrate the appellant's awareness of the nature of the material he published.

Even as to those books which he did not publish, knowledge has also been established. The book jackets openly proclaim the material contained. Depicting in practically all cases the fantasy symbols of fetishism, spankings and sado-masochistic tortures, these jackets go far beyond those covers found on the "slick" magazines. In addition the titles reflected on the jackets in the main effectively inform the casual eye of the underlying obscenity. Other facts which indicate *scienter* are the exorbitant prices assessed for just a few pages of poorly bound material [see e.g. Exh. 1 (cardboard cover, staple bound, 50 pages for $10.00)]. Also indicating knowledge are notations on the exhibits announcing the books "privately printed," some in foreign countries, "for sophisticated collectors of the unusual."

Certainly, when all these elements are evaluated the conclusion that *scienter* has been overwhelmingly established is inescapable. The added claim that *scienter* was not an element of the crime under the New York statute is simply incorrect [*People* v. *Finkelstein,* 9 N.Y. 2d 342 (1961)].

(3) The Evidence was Lawfully Seized.

Finally, the contention that the books were seized in violation of the Fourth Amendment (brief, pt. 7) is wholly rebutted by the facts of their acquisition.

Concerning the seizure at the warehouse

The printer Levenberg, at first, maintained a "warehouse" for the books in Room 908 at 37 West 20th Street, the lease for which was in his name (550-5, 561, 562). Subsequently, Levenberg moved the books to the basement of that building (559-61). On cross-examination Levenberg testified that after conferring with his attorney, he had decided to surrender the books in the basement to the police; and that "The police never threatened me. It is a funny thing; they never threatened me" (902-14). It is thus quite clear that the books were obtained by the voluntary consent of Levenberg, and that, because of Levenberg's custody of the books and his relationship to the appellant as an accomplice, the books were properly admissible against the appellant under the Fourth Amendment [*United States* v. *Eldridge,* 302 F. 2d 463, 465 (4th Cir. 1962); *United States* v. *Sferas,* 210 F. 2d 69, 74 (7th Cir. 1954); *United States* v. *Goodman,* 190 F. Supp. 847, 850 (N. D. Ill. 1961)].

In the second place, even after Levenberg had agreed to surrender the books, the police with extreme caution obtained a search warrant for the warehouse. And it was pursuant to that warrant that the books were seized (398-404, 411-2). On the trial of the case, the defense reserved the right to examine police Lieutenant Dimler "as to the

adequacy of the search warrant" (405-6). The appellant later waived the reservation and stipulated to Dimler's testimony. It must be concluded then, that the appellant, who had the burden of proof in establishing the invalidity of the warrant, has totally failed in that regard. Moreover, by stipulating to Dimler's testimony he has waived the issue of sufficiency. And that issue, therefore, is unavailable to him on this appeal [see *People* v. *Wilson,* 16 App. Div. 2d 207 (1st Dept. 1962)].

Concerning the seizure at the bookstores

The balance of the books (Exhs. 43-72) were seized variously in The Publisher's Outlet Store, Midget Book Shop, and The Main Stem Book Store (429-49, 450-63, 487-92), premises with shelves and racks displaying books and magazines (431, 450, 457-8). At one point in cross-examination, Inspector Plansker—the seizing officer—indicated that the door to Publisher's Outlet was open (465-6). Nothing, however, in the record establishes that the seizing officers searched the premises prior to the seizure.

The officers clearly had the right—possessed by the general public—to enter the shops and examine the books displayed for sale. Having observed that the books in question were pornographic, the officers then had the right to seize them. Such seizure—based on observation alone —entailed no invasion of the right of privacy guaranteed by the Fourth Amendment and, consequently, was lawful [*Hester* v. *United States,* 265 U. S. 57 (1924); *United States* v. *Lee,* 274 U. S. 559 (1927); *United States* v. *Lefkowitz,* 285 U. S. 452, 465 (1932); *Ellison* v. *United States,* 206 F. 2d 476, 478 (D. C. Cir. 1953)].

The appellant's reliance on *Marcus* v. *Search Warrants* [367 U. S. 717 (1961)] in connection with the seizure of the books in the shops is without merit. In *Marcus*, the Supreme Court held that a search, pursuant to warrant, authorizing a search for material described only as obscene was a general search and, therefore, violative of the Fourth Amendment. That, however, is not the case here.

Moreover, it is apparent that the seizure of the obscene books at Publisher's Outlet were incident to lawful arrests. The police went to the book store and found it open for business. They arrested Cosky and two other individuals and seized over two hundred obscene books from the store which had been described as having shelves and racks displaying magazines. Seizures incident to a lawful arrest are, of course, lawful [*People* v. *Loria*, 10 N. Y. 2d 360 (1961)].

Conclusion

We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented for the decision of this Court.

Respectfully submitted,

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